

UNITED STATE BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Case No.: 03-50867 GFK

DAVID S. SWARTZ,

Debtor.

NOTICE OF HEARING AND MOTION FOR TURNOVER

TO: THE ABOVE-NAMED DEBTOR, HIS ATTORNEY MARTHA M. MARKUSEN, AND
OTHER PARTIES IN INTEREST SPECIFIED IN LOCAL RULE 9013-3

1. Robert R. Kanuit, the duly-appointed and acting trustee in the above-captioned matter, moves the Court for relief requested below and gives notice of hearing herewith.

2. The Court will hold a hearing on this motion on October 6, 2004, at 2:00 p.m., or as soon thereafter as counsel can be heard, before Honorable Gregory F. Kishel, Courtroom No. 2, U.S. Courthouse, 515 West Fifth Street, Duluth, Minnesota.

3. Any response to this motion must be filed and delivered not later than September 29, 2004, which is seven (7) days before the time set for the hearing, or filed and served by mail not later than September 26, 2004, which is ten (10) days before the time set for the hearing. **If no response is timely filed, the Court may in its discretion enter an order granting turnover without a hearing.**

4. This Court has jurisdiction over this motion or this motion is authorized under 28 U.S.C. 157 and 1334, Federal Rules of Bankruptcy 4002, and Local Rule 1070-1. The petition commencing the debtor's Chapter 7 case was filed on July 2, 2003. Robert R. Kanuit was appointed as Chapter 7 Trustee on July 2, 2003. This case is now pending in this Court.

5. This motion arises under 11 U.S.C. 521, 541, 542 and 704 and Federal Rules of Bankruptcy Procedure 4002 and 7001. This motion is filed under Federal Rules of Bankruptcy Procedure 9014 and Local Rules 9013-1. The Chapter 7 trustee requests turnover of information.

6. By correspondence dated August 18, 2004, attached hereto and incorporated herewith as Exhibit A, the trustee required turnover of information, specifically copies of debtor's 2003 state and federal income tax returns.

7. The debtor has failed to turn over the information.

8. Because the debtor has failed to turn over the information, the trustee has been unable to account for and administer all assets of the bankruptcy estate as required by 11 U.S.C. 704.

9. In order to ensure that the debtor complies with any order issued by the Court as a result of this motion in a timely manner, the trustee requests that the order be specifically made applicable to revocation of the discharge under 11 U.S.C. 727(a)(6)(A) to allow the trustee to pursue revocation under 727(d)(3) should the debtor not promptly comply with its provisions.

10. This verified motion is based upon all of the files and records herein.

WHEREFORE, the undersigned requests an order of the Court:

1. Directing the debtor to turn over to the trustee the information described above.
2. Directing that the failure to comply with the order of the Court requiring a turnover and an accounting as provided for herein be grounds for revocation of discharge under 11 U.S.C. 727(a)(6)(A).
3. For costs and attorney fees of \$250.00 in connection with bringing this motion.
4. For such other relief as the Court deems just and equitable.

/e/ Robert R. Kanuit

Robert R. Kanuit
Attorney License No.: 0252530
4815 W. Arrowhead Drive, #230
Hermantown, MN 55811
(218) 722-7722

VERIFICATION

I, Robert R. Kanuit, movant, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Dated this 7th day of September, 2004.

/e/ Robert R. Kanuit
Robert R. Kanuit

EXHIBIT "A"

August 18, 2004

Ms. Martha M. Markusen
Fryberger, Buchanan, Smith &
Frederick, P.A.
302 W. Superior Street
Duluth, Minnesota 55802

Re: Bankruptcy Case No.: 03-50867
Debtor: David S. Swartz
Our File No.: 03-512K

Dear Ms. Markusen:

Please ask your client to forward me copies of his 2003 state and federal income tax returns within ten (10) days of the date of this letter.

Thank you.

Sincerely,

Robert R. Kanuit

RRK:bkp

UNITED STATES BANKRUPTCY COURT
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**TRUSTEE'S MEMORANDUM OF FACTS AND LAW
IN SUPPORT OF MOTION FOR TURNOVER OF INFORMATION**

Robert R. Kanuit, Chapter 7 trustee, submits the following Memorandum of Facts and Law in Support of his Motion for Turnover in the above-captioned case, and as grounds therefore would respectfully show the Court:

FACTS

1. This Chapter 7 case was filed on July 2, 2003, and is now pending before this Court.
2. Robert R. Kanuit was appointed as Chapter 7 trustee on July 2, 2003.
3. The trustee made demand upon the debtor for turnover of information needed to administer the bankruptcy case on August 18, 2004.
4. The debtor failed to supply necessary information to the trustee in response to the turnover demand.
5. The debtor continues to withhold information necessary to conclude administration of the bankruptcy case.

DISCUSSION

1. Turnover of Information and Property.

Bankruptcy debtors receive a substantial benefit when relieved of personal liability for repayment of unsecured obligations through discharge. In achieving a balance between the rights of debtors and their creditors, Congress has determined that debtors have an affirmative duty to turn over information necessary to complete administration of the bankruptcy case.

Sections 521(3) and (4) of the Bankruptcy Code provide in pertinent part:

[t]he debtor shall -- . . .

(3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under Section 344 of this title; .

..

The law interpreting the above sections of the Code is well settled concerning a debtors' affirmative obligation to cooperate with the trustee and to supply necessary information for case administration. See: In re: Lange, 110 B.R. 907, 909 (Bankr. D.Minn. 1990); In re: Bentley, 120 B.R. 712, 715 (Bankr. S.D.N.Y. 1990); and In re: Ridley, 115 B.R. 731, 736 (Bankr. D.Mass. 1990).

Due to the debtor's failure to supply necessary information, administration of this bankruptcy case has been unduly delayed. The trustee is entitled to an order requiring that the debtor provide information, specifically copies of debtor's 2003 state and federal income tax returns.

2. Forfeiture of Discharge.

Under 11 U.S.C. § 727(a)(6)(A), if debtors refuse to comply with court orders, discharge of debts may be withheld. In this case the trustee requests that if the trustee's motion is granted, the terms of the order be applicable under 11 U.S.C. § 727(a)(6)(A) so that the debtors will have an additional incentive to perform in a timely manner.

Based upon the foregoing, the Chapter 7 trustee is entitled to an order requiring that the debtor turn over information requested in Exhibit A to the motion so that he may conclude administration of the bankruptcy estate. To expedite resolution of this matter, the trustee requests that the order be designated a lawful order pursuant to 11 U.S.C. § 727(a)(6)(A).

Dated this 7th day of September, 2004.

/s/ Robert R. Kanuit

Robert R. Kanuit

VERIFICATION

I, Robert R. Kanuit, movant, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Dated this 7th day of September, 2004.

/s/ Robert R. Kanuit

Robert R. Kanuit

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re:

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DAVID S. SWARTZ,

Debtor.

UNSWORN DECLARATION FOR PROOF OF SERVICE

The undersigned, being an employee of Kanuit & Bray, Ltd., attorneys licensed to practice law in this Court, with office address of 4815 W. Arrowhead Road, Hermantown, MN 55811, declares under penalty of perjury that on the date stated below, she served the annexed **Notice of Hearing and Verified Motion for Turnover, Memorandum of Law, and (proposed) Order** upon the persons/entities named below by mailing to them copies thereof by enclosing same in an envelope with first class mail postage prepaid and depositing same in the post office at Hermantown, Minnesota, addressed as follows:

David S. Swartz
2383 Smith River Road

Duluth, MN 55804

Martha M. Markusen
Fryberger, Buchanan, Smith & Frederick,
P.A.
302 West Superior Street
Duluth, MN 55802

U.S. Department of Justice
Office of the United States Trustee
U.S. Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, MN 55415

Dated this 7th day of September, 2004.

/e/ Bonnie K. Vanderpool
Bonnie K. Vanderpool

UNITED STATE BANKRUPTCY COURT
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ORDER

The above-captioned matter came before the Court on October 6, 2004, on motion by the Chapter 7 trustee, Robert R. Kanuit, seeking an order requiring the debtor turn over information, specifically: copies of debtor's 2003 state and federal income tax returns.

Robert R. Kanuit appeared for the trustee. Other appearances are noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

Based upon the files and records, and arguments of counsel,

IT IS HEREBY ORDERED,

1. That the debtor shall turn over to the trustee the following: copies of debtor's 2003 state and federal income tax returns, not later than November 6, 2004.
2. That this order shall constitute a lawful order within the meaning of 11 U.S.C. 727(a)(6)(A) for purposes of discharge revocation should the debtor fail to comply with its terms in a timely manner.
3. That the attorney for the trustee is hereby awarded \$250.00 as and for attorney fees and costs in connection with the motion for turnover. That said award shall be paid to Kanuit & Bray, Ltd., within 10 days of entry of this order.

Dated this _____ day of _____, 2004.

Honorable Gregory F. Kishel
United States Bankruptcy Judge